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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

COMMONWEALTH OF
MASSACHUSETTS, by its DIVISION OF
MARINE FISHERIES,

and,

STATE OF NEW HAMPSHIRE, by its
FISH & GAME DEPARTMENT,
DIVISION OF MARINE FISHERIES,

Plaintiffs,

v.

OTTO WOLFF, Acting Secretary of
Commerce, et al.,

Defendants.

Case No. 06-cv-12110 (EFH)

**FEDERAL DEFENDANTS'
MEMORANDUM IN SUPPORT OF
MOTION TO ALTER OR AMEND
THE COURT'S ORDER
AND IN SUPPORT OF MOTION
FOR STAY PENDING
RESOLUTION OF MOTION**

INTRODUCTION

Pursuant to Fed. R. Civ. Proc. 59(e), Federal Defendants^{1/} hereby move to alter or amend the Court's January 26, 2009 Memorandum and Order, Dkt. No. 38 ("Order"), with respect to remedy. Federal Defendants respectfully request that the Court vacate that portion of its Order providing that Framework 42 is temporarily suspended pending review of the mixed-stock exception by Federal Defendants. Order at 7. Defendants further request that the Court stay the effect of that portion of its Order pending resolution of this motion.

By suspending the management measures contained in Framework 42 in the waning months of the fishing year, the Court's Order has triggered a massive disruption in the groundfish fishery which eliminates crucial conservation measures necessary to protect severely depleted groundfish stocks. See Declaration of Patricia A. Kurkul, Northeast Regional Administrator of the National Marine Fisheries Service ("NMFS"), attached hereto as Exhibit 1 ("Kurkul Declaration"), at ¶ 3. The Court's Order also threatens to cause irreparable economic harm to the fishing industry by suspending key mitigation measures designed to reduce the negative economic impact of all fishing regulations, including those that will remain in effect after the suspension of Framework 42. See id. As a result, there is widespread uncertainty and confusion among members of the fishing industry as to what rules are currently in effect and whether decisions and agreements made based on measures contained in Framework 42, such as contracts to lease days-at-sea (DAS), will be honored. See id. In NMFS' view, the effect of the Court's Order is that all measures in place prior to the effective date of Framework 42

^{1/} Mr. Wolff, Acting Secretary of Commerce, is substituted for Carlos M. Gutierrez pursuant to Fed. R. Civ. P. 25(d)(1).

(Amendment 13 and Frameworks 40-A and 40-B) presently govern the fishery. As more fully detailed in the Kurkul Declaration, removing the measures contained in Framework 42 is likely to cause significant damage to the groundfish resource and to the groundfishing industry.

BACKGROUND

In its January 26, 2009 Order, the Court denied Plaintiffs' motion for summary judgment (Dkt. No. 21), and granted in part Federal Defendants' cross-motion for summary judgment (Dkt. No. 28) as to Count III of Plaintiffs' complaint. Id. The Court denied Federal Defendants' cross-motion, at this time, as to Count II of Plaintiffs' complaint, which alleges that NMFS was required to consider the mixed-stock exception. Id. The Court ordered Federal Defendants to analyze the applicability of the mixed-stock exception and file a report of their findings with the Court no later than 60 days from the date of the Court's Order. Id.

Defendants hereby move, pursuant to Fed. R. Civ. Proc. 59(e), to alter or amend that portion of the Court's Order that temporarily suspends Framework 42 pending analysis of the mixed-stock exception. To the extent the suspension of Framework 42 is viewed as a preliminary injunction, it constitutes clear error because such relief is prohibited under the Magnuson-Stevens Act, and the Court made no findings with respect to the factors necessary for demonstrating entitlement to a preliminary injunction. To the extent the suspension of Framework 42 is a permanent injunction, the Court erred in failing to consider the applicable standard for issuing a permanent injunction and in issuing an overly broad injunction that is not based on any evidence or justification as to its need or relationship to the issues raised in the litigation. By suspending the management measures contained in Framework 42, the Court effectively has implemented an amendment to the groundfish fishery management plan which

undercuts critically important conservation measures and eliminates important mitigation measures designed to lessen the impact of fishing regulations on fishermen, all without the benefit of analysis or public input or comment as is required by the Magnuson-Stevens Act.

For purposes of this motion, Federal Defendants do not object to that portion of the Court's Order requiring Federal Defendants to review the applicability of the mixed-stock exception.²¹ However, Federal Defendants dispute that the Court may order the New England Fishery Management Council ("Council") to conduct the review of the mixed-stock exception "under the supervision of NMFS and Commerce." See Order at 7, n. 4. The Council is not a party to this lawsuit, and the Court lacks jurisdiction to issue an order compelling the Council to act. The judicial review provisions of the Magnuson-Stevens Act apply only to regulations promulgated by the Secretary of Commerce, and not to actions taken by the Council. See 16 U.S.C. § 1855(f). Further, NMFS lacks authority to supervise the actions of the Council. Contra Order at 2 ("These fishery management councils are regulatory bodies operating under the supervision of NMFS."). The fishery management councils are quasi-legislative bodies established by the Magnuson-Stevens Act and made up of federal, state, and territorial fishery management officials (including a NMFS representative), participants in commercial and recreational fisheries, and other individuals with scientific experience or training in fishery conservation and management. See id. at § 1852(b). NMFS is authorized only to approve, disapprove, or partially disapprove the Council's proposed revisions to fishery management

²¹ Although they do not move for reconsideration of this portion of the Court's Order, Federal Defendants do not concede that the Court had authority to require NMFS to complete the review of the mixed-stock exception within 60 days. Under the Administrative Procedure Act ("APA"), the Court may "hold unlawful and set aside agency action. . .," remanding to the agency for further review. See 5 U.S.C. § 706(2). But nothing in the APA authorizes the Court to set a deadline for completion of that review.

plans. See id. at § 1854(a)(3); 50 C.F.R. § 648.90 (a)(2). Although NMFS cannot supervise the Council's consideration of the mixed-stock exception, NMFS is preparing a report on the mixed-stock exception and will request that the Council consider the issue at its next meeting, to be held February 9-13, 2009. On or before March 27, 2009, NMFS will submit a report to the Court setting forth its findings, and those of the Council, regarding the mixed-stock exception.

STANDARD OF REVIEW

Motions to alter or amend a judgment pursuant to Fed. R. Civ. Proc. 59(e) must be filed no later than ten days from entry of judgment. A motion under Rule 59(e) may seek reconsideration, vacatur, or reversal of the district court's prior holding. See National Metal Finishing Co. v. Barclays American/Commercial, Inc., 899 F.2d 119, 123-124 (1st Cir. 1990). Although Rule 59(e) itself does not state the grounds on which relief may be granted, case law establishes that relief is available where the movant demonstrates (1) manifest error of law or fact, (2) newly discovered evidence, or (3) an intervening change in the law. See id. at 124. In designating these circumstances in which relief is available under Rule 59(e), courts "attempt[] to balance the need for finality with the need for justice." Venegas-Hernandez v. Sololux Records, 370 F.3d 183, 190 (1st Cir. 2004). "[T]he district courts have considerable discretion in deciding whether to grant or deny a motion to alter or amend under Rule 59(e)." Id. (citations omitted). See also National Metal Finishing, 899 F.2d 119, 125 (district court's decision to grant or deny Rule 59(e) motion is reviewable by the appellate courts only for abuse of discretion).

ARGUMENT

I. THE INJUNCTIVE RELIEF ORDERED BY THE COURT IS PROHIBITED UNDER THE MAGNUSON-STEVENSON ACT.

The injunctive relief ordered by the Court is akin to a preliminary injunction, which is prohibited in cases brought under the Magnuson-Stevens Act. See 16 U.S.C. § 1855(f)(1)(A). The Court's Order states that it "temporarily suspends Framework 42 pending serious consideration and analysis of the Mixed- Stock Exception by Defendant." Order at 7. The Court grants judgment in Federal Defendants' favor as to Count III, but reserves entry of judgment on Counts I, II, IV, V, VI, VII, and VIII pending the review of the mixed-stock exception. Id. at 7-8. In the apparent absence of a final judgment regarding Count II, the temporary suspension of Framework 42 is tantamount to a preliminary injunction, which is prohibited under the Magnuson-Stevens Act. Moreover, the Court made no finding that the factors necessary for demonstrating entitlement to a preliminary injunction were satisfied in this case. Thus, the temporary suspension of Framework 42 is a clear error of law compelling the Court to amend its Order.

Preliminary injunctions are not available in cases challenging regulations issued under the Magnuson-Stevens Act. 16 U.S.C. § 1855(f)(1)(A). Section 305(f)(1) of the Magnuson-Stevens Act, 16 U.S.C. 1855(f)(1), provides for judicial review in accordance with the APA of regulations issued to implement a fishery management plan, except that "section 705 of such Title is not applicable." Section 705 of the APA otherwise would provide the court with the authority to enter preliminary relief:

On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or

rights pending conclusion of the review proceedings.

5 U.S.C. § 705. Thus, under the Magnuson-Stevens Act, the judicial review provisions specifically foreclose preliminary injunctions or other emergency relief.

As the Ninth Circuit acknowledged in Turtle Island Restoration Network v. U.S. Dep't of Commerce, in Magnuson-Stevens Act cases, “the court reviews the contested regulations in accordance with the APA *except* that § 1855(f)(1)(A) precludes preliminary injunctive relief, a remedy ordinarily available under the APA.” 438 F.3d 937, 944 (9th Cir. 2006). The bar on preliminary or emergency injunctive relief is one part of the statutory scheme to ensure that fisheries cases are expedited without interruption of the fishery. Other measures in the statute to promote expeditious resolution of these cases include a 30-day statute of limitations, 16 U.S.C. § 1855(f)(1), and a 45-day, rather than a 60-day, period for the Secretary to answer the complaint and file the administrative record. 16 U.S.C. § 1855(f)(3)(A).

Courts routinely have denied requests for preliminary injunctive relief in Magnuson-Stevens Act cases. See Kramer v. Mosbacher, 878 F.2d 134, 137 (4th Cir. 1989) (“The exclusion of Section 705 powers prevents a reviewing court from issuing the sort of preliminary injunction granted by the district court”); Connecticut v. Daley, 53 F. Supp. 2d 147, 156 (D. Conn. 1999), *aff'd*, 204 F.3d 413 (2d Cir. 2000) (noting that Magnuson-Stevens Act “expressly forbids a reviewing court from postponing the effective date of the Secretary’s action while it conducts its review”); Blue Water Fishermen’s Ass’n v. NMFS, 158 F. Supp. 2d 118, 123 (D. Mass. 2001) (denying plaintiffs’ motion for preliminary injunction because “the Magnuson-Stevens Act proscribes a court from preserving a party’s status or rights pending review on the merits”); Cape Cod Commercial Hook Fishermen’s Ass’n v. Daley, 30 F. Supp. 2d

111 (D. Mass. 1998) (holding that Magnuson-Stevens Act prohibits injunctive relief); Pacific Coast Fed'n of Fishermen's Ass'ns v. Secretary of Commerce, 494 F. Supp. 626, 627-29 (N.D. Cal. 1980) ("On its face, Section 305(d) precludes the grant of a preliminary injunction"). See also S. Conf. Rep. 94-711, reprinted at 1976 U.S. Code Cong. & Admin. News, 660, 678 (1976) (regulations are subject to review "except that the reviewing court is without authority to enjoin the implementation of those regulations pending the judicial review"). The Court's Order enjoins the operation of Framework 42, without a final judgment, pending further review by the Court, contrary to the prohibition against preliminary injunctive relief under the Magnuson-Stevens Act. This constitutes a substantial error of law warranting reconsideration. See Kalman v. Berlyn Corp., 706 F. Supp. 970, 974 (D. Mass. 1989) (to prevail on Rule 59(e) motion based on manifest error of law or fact, moving party must make a showing of a substantial reason that the court was in error).

Moreover, even if such preliminary injunctive relief were permitted under the Magnuson-Stevens Act, it would be inappropriate in this case because the Court made no findings with respect to the factors necessary for demonstrating entitlement to a preliminary injunction. In order to obtain a preliminary injunction, the First Circuit has held that the moving party must demonstrate: "(1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." Esso Standard Oil Co. v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006) (citation omitted). The burden is on the party seeking the preliminary injunction to establish that these four factors

weigh in its favor. *Id.* These factors were neither briefed nor argued by the parties, and the Court made no finding that the factors weigh in favor of granting such an extraordinary remedy in this case. Issuing preliminary injunctive relief without making any findings as to the foregoing factors constitutes clear error warranting reconsideration of the Court's Order.

II. THE COURT DID NOT MAKE THE REQUIRED FINDINGS TO SUPPORT PERMANENT INJUNCTIVE RELIEF, AND THE RELIEF GRANTED IS NOT NARROWLY TAILORED TO REMEDY THE ALLEGED HARM.

Even if the relief ordered by the Court is viewed as a permanent injunction, rather than a prohibited preliminary injunction, it is clearly erroneous because the Court, without citing to any justification or need for the temporary suspension, made no finding of harm to Plaintiffs justifying the suspension of Framework 42, and failed to consider whether the public interest would be adversely affected. Further, although Federal Defendants believe that no measures of Framework 42 should be suspended, the injunction does not even attempt to consider whether it should be narrowly tailored to address the very vague and uncertain harm alleged by Plaintiffs. Although Plaintiffs apparently focus on only one measure in Framework 42 – DAS counting for vessels fishing in the Gulf of Maine – the Court's Order enjoins Framework 42 in its entirety.

The injunctive relief ordered by the Court is not supported by the requisite finding of harm or consideration of the impact such relief would have on the public interest. "The standard for issuing a permanent injunction requires the district court to find that (1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction."

Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla, 490 F.3d 1, 8 (1st Cir. 2007)

(citation omitted). The Court's Order is silent on the issue of whether irreparable harm will result to the Plaintiffs if Framework 42 remains in force during NMFS' review of the mixed-stock exception. Nor did the Court consider harm to Federal Defendants, or whether the public interest would be adversely affected. As described infra, Section III, and discussed in detail in the Kurkul Declaration, the suspension of Framework 42 will have significant adverse consequences on the public interest. The Court's failure to consider these factors constitutes clear error.

Further, even assuming that injunctive relief is appropriate in this case, the relief ordered is overly broad because it suspends Framework 42 in its entirety, without any consideration as to its relationship to the issues raised by Plaintiffs' challenge. "An injunction should be narrowly tailored to give only the relief to which plaintiffs are entitled." Brown v. Trustees of Boston Univ., 891 F.2d 337, 361 (1st Cir. 1989), citing Califano v. Yamasaki, 442 U.S. 682, 702 (1979). "[T]he scope of injunctive relief is dictated by the extent of the violation established. . . ." Califano, 442 U.S. at 702.

Here, the broad injunctive relief suspending Framework 42 in its entirety is a remedy wholly disproportionate given the narrow scope of Plaintiffs' allegations and total lack of specificity as to what harm they, or fishermen in their states, have suffered. At most, Plaintiffs vaguely implied in their summary judgment briefs that the differential DAS provisions might have been modified if the mixed-stock exception was considered. But there is no evidence before the court that this vague implication justifies the suspension of Framework 42 in its entirety, or even a more narrowly focused suspension of certain measures. See Federal Defendants' Reply in Support of Cross-Motion for Summary Judgment, Dkt. No. 32, at 13,

citing Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 236-37 (D.D.C. 2005) (“Since these portions are severable from the rest of the FMP, no purpose would be served by the disruptive approach of vacating other parts of the plan”). In the absence of justification as to why the suspension of all or any of the measures in Framework 42 is warranted, the Court erred in vacating the entire suite of management measures. Thus, reconsideration of the Court’s Order is warranted.

III. THE INJUNCTIVE RELIEF ORDERED BY THE COURT WILL ADVERSELY AFFECT THE PUBLIC INTEREST.

The suspension of Framework 42 causes significant and potentially crippling adverse impact to the public interest by wiping out critical conservation and mitigation measures resulting in undoubtable harm to the resource and possible irreparable economic harm to the fishing community, not to mention widespread confusion in the fishery which has already become apparent. Federal Defendants cautioned in their summary judgment briefs that vacatur of Framework 42 would lead to chaos in the fishery because: (a) it would not be clear what management measures would apply in the groundfish fishery; and (b) vacatur would remove restrictions on fishing effort that the Council and NMFS concluded were necessary for conserving the resource. See Federal Defendants’ Memorandum in Support of Cross-Motion for Summary Judgment, Dkt. No. 29, at 27-29. This concern is echoed by the NMFS Northeast Regional Administrator:

. . . the suspension of the carefully balanced and complex set of fishery conservation and management measures in [Framework] 42 would result in a significant disruption in this fishery, likely leading to a substantial setback in progress to rebuild the groundfish resources, possibly irreparable economic harm to the fishing industry and widespread confusion and uncertainty in the fishing industry, at least in the short term, as to what rules it would be operating under. . . . It would also suspend several important measures that were designed to alleviate impacts resulting from all groundfish measures, thus causing potentially irreparable economic harm to many members of the fishing industry, and

removing flexibility in their fishing activity.

Kurkul Decl. ¶ 3.

The consequences of the Court's Order are far-reaching, eliminating a number of measures that are necessary to preserve conservation and management of groundfish stocks. For example, in addition to the DAS provisions at issue in this case, other measures that will be eliminated include trip limits, gear requirements, and recreational fishery limits. See id. at ¶ 9. Other measures that will be eliminated include those designed to mitigate impacts of the groundfish conservation measures on the fishing community, such as leasing and transfer of DAS and the Category B DAS program, which allows fishermen to target healthy stocks under certain conditions. See id. at ¶ 8. It also eliminates the use of Mandatory Vessel Monitoring System ("VMS"), used by NMFS to monitor compliance with management measures and by the U.S. Coast Guard in search and rescue operations. See id.

Even an injunction limited to suspension of the DAS measures challenged by Plaintiffs would be adverse to the public interest. The DAS measures are "critical to ensuring that rebuilding timelines mandated by the [Magnuson-Stevens Act] are met for several key groundfish stocks, including Gulf of Maine cod, Cape Cod/Gulf of Maine yellowtail flounder, Southern New England yellowtail, and white hake." Id. at ¶ 9. Suspension of the DAS measures would lead to a race to fish for groundfish stocks, resulting in fishing effort of up to twice the number of DAS permitted under Framework 42. Id. This would have severe consequences for conservation of depleted groundfish stocks, and would also raise safety concerns by increasing the incentive for fishermen to race to fish during inclement weather. Id.

The elimination of the significant conservation measures in Framework 42 comes at a

time when NMFS is already struggling to address the need to reduce fishing mortality even further to ensure that groundfish stocks are rebuilt within the time frames mandated by the Magnuson-Stevens Act. See id. at § 5. NMFS recently published a proposed interim rule that imposes even more restrictive measures than those contained in Framework 42, based on NMFS' determination that such measures are necessary to ensure that rebuilding objectives are not jeopardized. Id. Because the suspension of the conservation measures in Framework 42 threatens to adversely impact both fishermen and the groundfish stocks, the public interest weighs against the injunctive relief ordered by the Court.

IV. THE COURT SHOULD GRANT A STAY PENDING RESOLUTION OF FEDERAL DEFENDANTS' MOTION FOR RECONSIDERATION.

Federal Defendants request that the Court stay the effect of that portion of its Order temporarily suspending Framework 42 pending resolution of this motion. As described supra at Section III and in the Declaration of Patricia Kurkul, vacating Framework 42 in its entirety, even temporarily, will have severe consequences for the regulated community and the groundfish resource. Thus, Federal Defendants respectfully request that the Court stay the effect of its Order with respect to the suspension of Framework 42 during the pendency of this motion for reconsideration.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court alter that portion of its Order providing that Framework 42 is temporarily suspended pending review of the mixed-stock exception by Federal Defendants. Federal Defendants further request that the Court stay the effect of that portion of its Order pending resolution of this motion.

Dated: February 2, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (“NEF”) and paper copies will be sent to those indicated as non registered participants on February 2, 2009.

/s/ Kristen Byrnes Floom

